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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-198

SUPREME COURT OF VIRGINIA, ET AL.,
Appellants,

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.,
Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

BRIEF ON BEHALF OF THE APPELLANTS

MARSHALL COLEMAN
Attorney General of Virginia

WALTER H. RYLAND
Chief Deputy Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
(804) 786-2071

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BRIEF ON BEHALF OF THE APPELLANTS

OPINIONS OF THE COURT BELOW

The Opinion of the District Court appears as an untitled attachment to the Order of the three-judge District Court declaring unconstitutional a portion of a certain rule of the Supreme Court of Virginia prohibiting advertising by attorneys and enjoining application of the rule to the appellees. The Order and the Opinion are reported *sub. nom.*

Consumers Union v. *Virginia State Bar*, 470 F.Supp. 1055 (E.D. Va. 1979). An earlier opinion in the same case is reported *sub. nom. Consumers Union* v. *American Bar Association*, 427 F.Supp. 506 (E.D. Va. 1976), *vacated and remanded* 433 U.S. 917 (1977).

JURISDICTION

This suit was brought by the appellees before a three-judge District Court pursuant to 28 U.S.C. § 2281 seeking an order declaring unconstitutional Rule 2-102(A)(6) of the Virginia Code of Professional Responsibility, a regulation of statewide application. The order of the District Court granting the relief requested by the appellees was entered on May 8, 1979. Notice of appeal was filed by the Virginia Court on June 7, 1979. The jurisdiction of this Court to review this decision by appeal is conferred by 28 U.S.C. § 1253. Jurisdiction lies under 28 U.S.C. § 1253 because the action was filed prior to the repeal of 28 U.S.C. § 2281 on August 12, 1976 by Section 7 of P.L. 94-381. P.L. 94-381 now appears as a footnote to 28 U.S.C.A. § 2284 and provides that the repeal does not apply to actions filed prior to the effective date of the Act. Probable jurisdiction was noted on October 15, 1979.

QUESTIONS PRESENTED

1. Is the Supreme Court of Virginia immune from judgment under the doctrine of judicial immunity?
2. May the Civil Rights Attorney's Fees Awards Act of 1976 be construed to permit an award of attorneys' fees against the Supreme Court of Virginia for its judicial acts?
3. Is the Supreme Court of Virginia immune from judgment under the doctrine of legislative immunity?
4. Does the doctrine of judicial immunity preclude the award of attorneys' fees for failure to correct a challenged judicial act which is the subject of litigation?
5. On the facts before it, did the District Court abuse its discretion in awarding fees against the Virginia Court?

RULE INVOLVED

DR 2-102 Professional Notices, Letterheads, Offices, and Law Lists.

(A) A lawyer or law firm shall not use professional cards, professional announcement cards, office signs, letterheads, telephone directory listings, law lists, legal directory listings, or similar professional notices or devices, except that the following may be used if they are in a dignified form:

* * *

(6) A listing in a reputable law list or legal directory giving brief biographical and other informative data. A law list or directory is not reputable if its management or contents are likely to be misleading or injurious to the public or to the profession. A law list is conclusively established to be reputable if it is certified by the American Bar Association as being in compliance with its rules and standards. The published data may include only the following: name, including name of law firm and names of professional associates; addresses and telephone numbers; one or more fields of law in which the lawyer or law firm concentrates; a statement that practice is limited to one or more fields of law; a statement that the lawyer or law firm specializes in a particular field of law or law practice but only if authorized under DR 2-105(A)(4); date and place of birth; date and place of admission to the bar of state and federal courts; schools attended, with dates of graduation, degrees, and other scholastic distinctions; public or quasi-public offices; mili-

tary service; posts of honor; legal authorships; legal teaching positions; memberships, offices, committee assignments, and section memberships in bar associations; memberships and offices in legal fraternities and legal societies; technical and professional associations and societies; foreign language ability; names and addresses of references, and, with their consent, names of clients regularly represented.

STATUTE INVOLVED

Section 42 U.S.C. § 1988, 90 Stat. 2641 provides

> "... In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public law 92-318, or in any civil action or proceeding by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."

STATEMENT OF THE CASE

On February 27, 1975, the appellees filed a complaint pursuant to 42 U.S.C. § 1343(3) and 42 U.S.C. § 1983 requesting the convening of a three-judge court to declare unconstitutional on its face DR-2 102(A)(6) of the Virginia Code of Professional Responsibility and to enjoin the Virginia State Bar, the American Bar Association, the Supreme Court of Virginia, and others, from prohibiting the publication of an advertising directory. The case was tried on May 17, 1976, prior to passage of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. The District Court entered an order on December 17, 1976,

granting partial relief in three separate opinions. Both parties appealed and this Court vacated and remanded for further consideration in light of *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977). *Consumers Union* v. *American Bar Association,* 433 U.S. 917 (1977).

Upon remand, defendants stipulated that they had no objection to publication of the advertising directory. (Response to Motion for Judgment on the Merits, June 12, 1978.) In July of 1978, the District Court heard oral argument on the issue of attorneys' fees. On May 8, 1979, the District Court entered its Order awarding attorneys' fees under 42 U.S.C. § 1988 as well as declaratory and injunctive relief against the Supreme Court of Virginia. The District Court found jurisdiction under 28 U.S.C. § 1343(3). 470 F.Supp. at 1058.

The District Court apparently based its award of attorneys' fees solely on the fact that in 1976, before this Court's decision in *Bates,* the Supreme Court of Virginia had rejected a proposed revision of the rule in question and upon the conclusion, unsupported by any evidence, that the Court had been derelict in not amending the rule, then or thereafter while the case was pending. In its opinion, the District Court formally announced for the first time that "in the interest of comity," it had "delayed" its decision in order to afford the Supreme Court of Virginia an opportunity to amend its rule. The District Court summarily rejected (Order, May 30, 1979) the Virginia Court's motion for rehearing and petition for leave to present evidence concerning the ongoing efforts of the Virginia State Bar and the Supreme Court of Virginia to formulate a constitutional rule. ("Representation of Testimony to be Offered," filed May 22, 1979; Petition for Rehearing, filed May 22, 1979). The Virginia Court proferred testimony that in 1976 it had declined to adopt the ABA's hastily adopted modifica-

tion of DR 2-102 because it needed further study and because Consumer's Union had advised that adoption of that version would not resolve the litigation.

SUMMARY OF ARGUMENT

The award of declaratory and injunctive relief in this case was prohibited by the doctrine of absolute judicial immunity. Accordingly, the award of attorneys' fees was improper.

Where the basis for jurisdiction is a challenge to a discretionary judicial act, judicial immunity is grounded in the separation of powers and is absolute. This immunity is of a higher order than immunities which originate in doctrines of comity or federalism or are conditioned upon "good faith."

Even if it is assumed that judicial immunity is only a creature of the common law which may be repealed by Congress, there is nothing in the language or legislative history of the Civil Rights Attorney's Fees Award Act of 1976 which repeals this immunity.

Judicial immunity is coextensive with legislative immunity. Whether adoption of the rule be classified as a judicial act or a legislative act, the act is entitled to absolute immunity and is a defense to an award of attorneys' fees.

Alternatively, the three-judge court abused its discretion in awarding attorneys' fees for post-trial lawful acts of a party. It erroneously assumed that the challenged rule governing the professional responsibility of attorneys was invalid on its face (rather than as applied), and that a facially valid rule had to be adopted. The three-judge court had no facts before it from which it could have inferred an improper motive from the failure to correct the challenged act.

ARGUMENT

I.

The Supreme Court Of Virginia Is Immune From Judgment Under The Doctrine Of Judicial Immunity

The Virginia Court was immune from suit for declaratory or injunctive relief. While the Virginia Court had promulgated the contested rule, it had taken no other action adverse to the rights claimed by Consumers Union. The Virginia Court was neither a necessary nor a proper party to the action since a declaration of the rule's invalidity or an injunction against its enforcement would not invoke or require any judgment against the Virginia Court. Accordingly, it was inappropriate to award attorneys' fees against the Virginia Court. At issue is the liability of a court for a judicial act. The only basis for jurisdiction over the Supreme Court of Virginia was that it adopted a rule later determined to be unconstitutional in part. The District Court determined this to be a judicial act within the Court's jurisdiction. 470 F.Supp. at 1059. This is no different from a legislative enactment of a law which is later determined to be invalid; immunity from liability in both cases is absolute.[1]

If Congress can require a court to defend its judicial acts against a potential award of attorneys' fees for punitive purposes, it can require any court, state or federal, to defend itself against an award of damages or imposition of criminal

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[1] The instant facts are materially different from the situation in *Hutto* v. *Finney*, 437 U.S. 678 (1978), wherein this Court held that an award of attorneys' fees could be made against a state agency when the agency was not a party. In *Hutto*, individual state employees were parties, and the fee award was made against the agency by which they were employed. In the present case the Court found that on the facts before it plaintiffs were not entitled to recover fees of the other defendants or the agency by whom they were employed. 470 F. Supp. at 1063.

sanction for the same acts. Since under *Davis* v. *Passman,* 99 S.Ct 2264 (1979), causes of action may arise directly under the constitution, the issues raised here are as relevant to issues of federal judicial immunity as to state judicial immunity. This would do unconscionable violence to our framework of government.

This immunity is of a high order. It is a common law rule which prior decisions have construed to be of constitutional origin. The immunity derives from the principles of separation of powers embodied in both the "guarantee clause" of Art. IV § 4 of the Constitution and the Tenth Amendment.

The Framers believed in an independent judiciary as an indispensable element of a republican form of government. Alexander Hamilton wrote that "there is no liberty if the power of judging be not separated from the legislative and executive powers. Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments. . . . The complete independence of the courts of justice is peculiarly essential in a limited constitution." The Federalist, No. 78 at 227-28 (2d Ed. R. Fairfield, 1966).

Abrogation of this immunity would be in derogation of an essential component of a republican form of government. To override an essential state function in derogation of a state's Tenth Amendment rights, Congress must have express authority. *National League of Cities* v. *Usery,* 426 U.S. 833 (1976). Absolute immunity is thus significantly different from the various abstention and sovereign immunity doctrines set forth in such decisions as *Younger* v. *Harris,* 401 U.S. 37 (1971), and *Edelman* v. *Jordan,* 415 U.S. 651 (1974). Those principles are founded upon considerations of "equity, comity, and federalism which do not have constitutional origin." Those decisions do not prohibit attacks

on the facial constitutionality of state policy.[2] Similarly, absolute immunity is different from that involved in coercive civil process in aid of a court's jurisdiction, *e.g.,* writs of mandamus and similar writs. *See Cohens* v. *Virginia,* 19 U.S. (6 Wheat.) 264 (1821); *Ex parte Bradley,* 74 U.S. (7 Wall.) 364 (1868). None of the foregoing constitute a fundamental state function, such as the exercise of discretionary judicial authority, which is constitutionally protected from encroachment by other branches of government.

As early as the reign of Richard III, the English common law accorded absolute immunity to judges for acts committed within their judicial capacity. 6 W. Holdsworth, *A Heritage of English Law* 235 (1927). *Floyd* v. *Barker,* 12 Coke Rep. 23, 77 Eng. Rep. 1305 (1607). This immunity was adopted in this country in *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335 (1871),[3] wherein the defendant had stricken from the rolls of the court the name of an attorney for defending one of the conspirators in the Lincoln assassination.

In deciding *Tenny* v. *Brandhove,* 341 U.S. 367 (1951), this Court assumed for purposes of argument that Congress could repeal legislative immunity in order to reach the statutory question upon which the case was decided. The Court then concluded that Congress had not intended to repeal this immunity and that the immunity extended to state legislators as well as to Congressmen.

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[2] *Steffel* v. *Thompson,* 415 U.S. 452 (1974); *Theard* v. *United States,* 354 U.S. 278 (1957); *Fairmont Creamery* v. *Minnesota,* 275 U.S. 70 (1927).

[3] The rationale of *Bradley* was adopted in Virginia in *Johnston* v. *Moorman,* 80 Va. (5 Hans.) 131, 139-140 (1885), which noted that the immunity exists to assure the public that "the judges should be at liberty to exercise their functions with independence and without fear of consequences." *Id.* at 140, quoting *Scott* v. *Stansfield,* 3 Law Rep. Exchequer, 220 (1868).

Legislative immunity under the "Speech or Debate Clause" of Article I § 6, cl. 1 of the Constitution provides members of Congress absolute immunity "not only from the consequences of litigation's results, but also from the burden of defending themselves." *Davis* v. *Passman,* 99 S.Ct. 2264, 2271 (1979); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967). Immunity under the "Speech or Debate Clause" was extended to state legislators, who are immune from all civil process for their legislative acts under *Tenny* v. *Brandhove, supra. See Eslinger* v. *Thomas,* 476 F.2d 225 (4th Cir. 1973). Similarly, judicial immunity is "equally established" as a defense to an action under 42 U.S.C. § 1983. *Pierson* v. *Ray,* 386 U.S. 547, 554-555, n. 9 (1967), citing *Bauers* v. *Heisel,* 361 F.2d 581 (3d Cir. 1966). *Bauers* recognized that Congressional abrogation of judicial immunity would constitute a legislative invasion of the judicial domain, in violation of the constitutional guarantee of a republican form of government. As noted in the "Brief Amicus Curiae On Behalf of the Conference of Chief Justices in Support of the Jurisdictional Statement," at p. 15, "The constitutional doctrine of separation of powers would seem to preclude legislative incursion on the independence of the judiciary by this means."

This Court in *Stump* v. *Sparkman,* 435 U.S. 349 (1978), recently reiterated the validity of the doctrine of absolute judicial immunity in a case where the facts pushed the doctrine to its limits. In doing so, the Court announced, *id.* at 355-56:

> "The governing principle of law is well established and is not questioned by the parties. As early as 1872, the Court recognized that it was 'a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself.' *Bradley* v. *Fisher,* [13 Wall. 335 (1872)], at 347. For that reason the Court held that 'judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly.' 13 Wall., at 351. Later we held that this doctrine of judicial immunity was applicable in suits under § 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, for the legislative record gave no indication that Congress intended to abolish this long-established principle."

Although *Bradley, Pierson,* and *Stump* specifically involved only suits for damages, none of the decisions limited the immunity to damage awards. In *Pierson,* judicial immunity was interpreted to protect against liability in all civil actions which, under 42 U.S.C. § 1983, includes "an action at law, suit in equity, or other proper proceedings for redress." 386 U.S. at 554.

This Court has not decided whether the phrase "all civil actions" means only actions for damages.[4] Most authorities considering the point have concluded that judicial immunity extends at least to all actions challenging a discretionary judicial act.[5] This Court has never condoned any concept that equity suits against judges were allowed under 42 U.S.C. § 1983. Most lower court decisions to the contrary are distinguishable.[6]

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[4] *Falkner* v. *Blanton,* 488 F. 2d 551 (5th Cir. 1974), *aff'd,* 419 U.S. 1080, *rehearing denied,* 419 U.S. 977 (Douglas, J., dissenting). The scope of the immunity was presented to the Court in *Littleton* v. *Berbling,* 468 F. 2d 389 (7th Cir. 1972), *rev'd on other grounds sub. nom. O'Shea* v. *Littleton,* 414 U.S. 488 (1974).

[5] *Mirvin* v. *Justices of the Supreme Court of Nevada,* 415 F. Supp. 1178, 1192 (D. Nev. 1976); *Mackay* v. *Nesbett,* 285 F. Supp. 498, *aff'd,* 412 F. 2d 846 (9th Cir. 1969), *cert. denied,* 396 U.S. 960, 397 U.S. 1004; *Gay* v. *Heller,* 252 F. 2d 313 (5th Cir. 1958); *Peckham* v. *Scanlon,* 241 F. 2d 761 (7th Cir. 1957); *Tate* v.

In fact, the rationale for immunity from money damages is equally applicable to actions for declaratory and injunctive relief. Judicial immunity exists because of the special nature of the responsibilities of judges; absolute immunity is necessary to assure that judges can perform their respective functions without harassment. *Butz* v. *Economou,* 438 U.S. 478 (1978).

The need for this immunity is seen in the instant case: The Supreme Court of Virginia in 1970 adopted a disciplinary rule barring advertising by attorneys. The rule had been adopted by the American Bar Association in 1969. At the time, the approval by this court of similar rules applicable to other professions made the law seem settled.[7]

Arnold, 223 F. 2d 782 (8th Cir. 1955); *Adkins* v. *Underwood,* 370 F. Supp. 510, *aff'd,* 520 F. 2d 890, *cert. denied,* 423 U.S. 1017; *Brown* v. *Dunne,* 409 F. 2d 341 (7th Cir. 1969); *Cheramie* v. *Tucker,* 493 F. 2d 586 (5th Cir. 1974); *Wood* v. *Circuit Court of Warren County,* 331 F. Supp. 1245 (E.D. Tenn. 1971) (A court is not an entity which may be sued.)

But see White v. *Crowell,* 434 F. Supp. 1119 (W.D. Tenn. 1977) (*per curiam*); *United States* v. *McLeod,* 385 F. 2d 734 (5th Cir. 1967); *Erdmann* v. *Stevens,* 458 F. 2d 1205 (2d Cir. 1972).

[6] Some are district court decisions which were affirmed or reversed on other grounds. *See, e.g., Law Students Civil Rights Research Council, Inc.* v. *Wadmond,* 299 F. Supp. 117 (S.D.N.Y. 969), *rev'd* 401 U.S. 154 (1971); *Rakes* v. *Coleman,* 318 F. Supp. 181 (E.D. Va. 1970); *Fowler* v. *Alexander,* 478 F. 2d 694 (4th Cir. 1973); *Boddie* v. *Connecticut,* 286 F. Supp. 968 (D. Conn. 1968), *rev'd,* 401 U.S. 371 (1970). Others are cases involving a lawless disregard of established civil rights by county judges. *See, e.g., United States* v. *Clark,* 249 F. Supp. 720 (S.D. Ala. 1965); *Bramlett* v. *Peterson,* 307 F. Supp. 1311 (M.D. Fla. 1969); *Phillips* v. *Cole,* 298 F. Supp. 1049 (N.D. Minn. 1968); *United States* v. *McLeod,* 385 F. 2d 734 (5th Cir. 1967). In these cases, the judges were all acting in flagrant disregard of their jurisdiction. *Stump* v. *Sparkman, supra,* would extend immunity from damages in such cases, but this case does not involve acts in disregard of settled rights.

[7] *Semler* v. *Oregon State Board of Dental Examiners,* 294 U.S. 608, 611-13 (1935); *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963); *Williamson* v. *Lee Optical of Oklahoma, Inc.,* 348 U.S. 483 (1955).

The 5-4 decision of this court in *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977), rendered the rule unenforceable on the facts of that case. *Bates* specifically upheld regulation of attorney advertising as to matters which were false, misleading or deceptive and left the door open to barring advertisement of undefined services not of a routine nature. Under the *Bates* decision, these plaintiffs have prevailed as to their right to publish information on fees charged and have requested a sum in excess of $121,000 in attorneys' fees.

The effect of *Bates* was to hold rules similar to Virginia's invalid only insofar as they conflicted with *Bates.* 433 U.S. at 383-84. The District Court seems to have concluded that *Bates* rendered the Virginia rule "overbroad" and unenforceable in its entirety. 470 F.Supp. at 1058.

To expose the considered judgments of a court to liability for monetary awards, even in the guise of attorneys' fees, and to subject the members of the tribunal to the jurisdiction of another court can have no effect other than to compel decisions on the basis of expediency. Introducing considerations extraneous to the law will be detrimental to the judicial process. Such a situation is precisely the reason for judicial immunity from judgment of any kind.

II.

42 U.S.C. § 1988 Should Not Be Construed To Permit An Award Of Attorneys' Fees Against The Supreme Court Of Virginia For Its Judicial Acts

Proper construction of the Civil Rights Attorneys' Fees Awards Act shows that the District Court erred in construing the act to abrogate judicial immunity from the award of fees. *Hutto* v. *Finney, supra,* 437 U.S. at 700 (Brennan, J. concurring) found a congressional intent to award fees against States in a proper case. The District

Court, however, interpreted a footnote in a House Report as rendering *Pierson* v. *Ray* immunity inapplicable to bar attorneys' fees awards and therefore extended the holding in *Hutto* to abrogate judicial immunity.[8] Indeed the Senate Report noted that, "The bill created no startling new remedy. . . ." S.Rep. No. 94-1011, 94th Cong., 2d Sess. 7 (1976). It was the Senate's bill which ultimately was adopted.

Appellants do not question that a judge who acted under color of law but outside his jurisdiction would be subject to judgment under 42 U.S.C. § 1983 and hence subject to the fee awards in spite of his good faith immunity. However, where the court has acted only within its jurisdiction and is absolutely immune, there is nothing in the wording of the statute or the legislative history to imply a congressional intent to abrogate that immunity. Fees are only awarded against a proper party. Just as *Pierson* v. *Ray, supra,* concluded that enactment of 42 U.S.C. § 1983 did not abrogate judicial immunity, so is there likewise no reason to infer that 42 U.S.C. § 1988 abrogated the immunity from the award of attorneys' fees.

As Justice Powell noted in his dissent in *Hutto*:

> "But in this sensitive area of conflicting interests of constitutional dimension, we should not permit items of legislative history to substitute for explicit statutory language. *SEC* v. *Sloan,* 436 U.S. 103, 121 (1978). The court should be hesitant to presume general congressional awareness of Eleventh Amendment consequences of a statute that does not make express provision for monetary recovery against the States. *Id.* at 706.

[8] (470 F. Supp. at 1060-61.) The footnote merely included *Pierson* v. *Ray, supra,* among a listing of cases discussing various immunities. There is no reason for this Court to construe that footnote as doing anything more than allowing fees for those acts answerable to suit under so-called "good faith immunity."

Because of the potential impact of attorneys' fees awards on the judiciary, this Court should adopt Justice Powell's logic on the facts of this case, and decline to infer a legislative intent from an ambiguous footnote in a legislative report. Where, as here, the only basis for jurisdiction is a judicial act, then a clear expression of legislative intent is required.

Congress enacted 42 U.S.C. § 1988 with the knowledge that *Pierson* v. *Ray, supra,* and *Tenny* v. *Brandhove, supra,* required an express repeal of judicial and legislative immunity. An oblique reference in a committee report does not satisfy the requirement of these precedents.

The District Court erred in assuming judicial immunity was a creature of common law which can be repealed by implication by an act of Congress. That argument was rejected by this Court in *Tenny* v. *Brandhove, supra,* wherein the issue was framed as:

> "Did Congress by the general language of its 1871 statute mean to overturn the tradition of legislative freedom achieved in England by Civil War and carefully preserved in the formation of State and National Government here? 341 U.S. at 376?"

The Court answers its prophetic question:

> "We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us."
>
> * * *
>
> "[H]ere the individual defendants and the legislative committee were acting in a field where legislators traditionally have power to act, and *** the statute of 1871 does not create civil liability for such conduct." *Id.* at 379.

Similar logic applies to judicial immunity. It is vital that

courts be free to exercise their discretion without threat of an award of attorneys' fees which could seriously impair the functioning of the court. In this sense the award of fees against the court may be more debilitating to the judicial process than an award of damages against a judge individually.

III.

The Supreme Court Of Virginia Is Immune From The Award Of Attorneys' Fees Under The Doctrine Of Legislative Immunity

It is urged that the Court rule that judicial and legislative immunity extend similar protections to legislatures and courts equally. The facts of this case entitle the Virginia court to immunity under both doctrines. For the Virginia Supreme Court in promulgating rules of procedure and conduct was acting in its legislative mode. Under *Butz* v. *Economou,* 438 U.S. 478 (1978), it is the nature of the act performed rather than the title of the official that determines whether immunity is afforded.

That legislative immunity is absolute cannot be disputed. *See Gravel* v. *United States,* 408 U.S. 606 (1972); *Brewster* v. *United States,* 408 U.S. 501 (1972). *Eastland* v. *United States Servicemen's Fund,* 421 U.S. 491, 503 (1975), notes, "We reaffirm that once it is determined that members are acting within the 'legitimate legislative sphere' the speech and debate clause is an absolute bar to interference." In *Dombrowski* v. *Eastland,* 387 U.S. 82, 84-85 (1967), this Court noted that legislators were immune from "the burden of defending themselves."

IV.

The Doctrine Of Judicial Immunity Precludes An Award Of Attorneys' Fees As A Penal Measure

The circumstances in which the award of attorneys' fees

was made against the Virginia Court show that the purpose was not so much to award costs to the prevailing party as to punish the Virginia Court for lawful post-*Bates* conduct with which the District Court merely disagreed. To protect the judiciary from this sort of intrusion is precisely the reason for immunity from damages.

The injury to the independence of the State judiciary by the decision of the District Court is underscored by the fact that the award of fees was based on a conclusion unsupported by evidence and without any prior order directing amendment of the rule. In its Opinion, the District Court formally announced for the first time that it had delayed its decision to afford the Supreme Court of Virginia an opportunity to amend its rule. 470 F.Supp. at 1063.

If the policy of protecting the independence of the judiciary means anything, it must afford protection from the abuses inherent in allowing one tribunal to award a potentially punitive sum against another. The award was made for punitive reasons and therefore is not different from an award of damages or a contempt citation against the Virginia Court. That such an award may be based upon facts not in evidence and without affording an opportunity to show the real facts is even more illustrative of the threat to the independence of the judiciary.

V.

Even Assuming That Fees May Be Awarded Against A Court For A Judicial Act, The District Court Abused Its Discretion In Awarding Fees

The District Court's opinion did not assign as a basis for awarding fees against the Virginia Court the fact that the Court had adopted in 1970 the ABA Rule prohibiting advertising by attorneys. The District Court did not find that any law or lawful process of that Court imposed an obligation to amend the rule. The District Court simply assumed

without any basis in fact that the Virginia Court was in some way being obstructive. The District Court refused the Virginia Court's petition to be allowed to present evidence on the extensive ongoing State activity to revamp advertising and solicitation rules. The result of denying the petition for rehearing was to force the Virginia Court into an appeal without the opportunity to show its unquestioned good faith.[9]

a.

THERE WAS NO OBLIGATION UPON THE SUPREME COURT OF VIRGINIA TO CORRECT A PRIOR JUDICIAL ACT WHICH WAS STILL IN LITIGATION

The District Court's concern arose from the fact that in holding the Virginia rule unconstitutional on its face it erroneously believed the rule to be wholly void for overbreadth, thus arguably requiring amendment of the rule. The original decision of the District Court had been based on an application of the overbreadth doctrine. 427 F.Supp. at 519. In fact, the rule is enforceable as long as it is applied in a manner consistent with *Bates*. 433 U.S. at 383-84. As the petition for rehearing alleged and as the Virginia Court was prepared to show, after *Bates,* the Virginia Court was following its established procedure of not amending a disciplinary rule of court without receiving recommendations on the subject from the state administrative agency, the Virginia State Bar, through which the court regulates

[9] The Virginia Court's petition for rehearing to put on evidence on the matters of concern to the three-judge court was denied without an opinion. (Order May 30, 1979.) The District Court Opinion avoids determination of the serious immunity issues by invoking the sentiment expressed in *Hutto* v. *Finney, supra,* 437 U.S. at 691, that an award of fees against a defendant acting in bad faith was tantamount to a fine for contempt and "vindicated the District Court's authority over a recalcitrant litigant." This simply overlooks the fact that *Hutto* involved the refusal to comply with a judgment and that bad faith was found as a fact after a hearing.

the practice of law in Virginia. The Virginia State Bar was acting to draft such amendments (see "Petition for Rehearing," May 22, 1979). In the meantime,, by not acting *sua sponte* to amend the rule, Virginia was lawfully applying the old rule only to the extent allowed by *Bates,* thus violating no principal of law or any directive of the District Court.[10]

b.

THE DISTRICT COURT HAD NO FACTS BEFORE IT TO SUGGEST THAT THE RULE SHOULD BE CHANGED

The District Court failed to consider that the Attorney General of Virginia had ruled, in an opinion disseminated by the Virginia State Bar to its members, that the Virginia rule would not be enforced except to the extent that enforcement was allowed under *Bates.*[11]

Had the Virginia Court adopted the rule proposed to it by the Virginia State Bar in 1976, the rule still would have prohibited the advertising of fees. Since Consumers Union appealed the ruling of the District Court that such a ban on advertising was proper, it is self-evident that adoption of the 1976 rule would not have terminated the litigation at that stage.

[10] The Virginia State Bar has now completed its work, and acting upon its recommendations, the Virginia Court has adopted, effective January 1, 1980, a rule permitting any advertising that is not false, misleading, or deceptive. Accordingly the issue of the unconstitutionality of the former Virginia Rule is now moot and declaratory relief is inappropriate. *See Preiser* v, *Newkirk,* 422 U.S. 395 (1975).

[11] A copy of the Attorney General's Opinion had been attached as part of Defendants' "Response to Plaintiff's Motion for Expedited Consideration," December 28, 1978, in which it was argued that none of the defendants had taken any action to enforce the Virginia rule in a manner contrary to *Bates.* In that pleading it was noted that the Attorney General had taken the extraordinary step of intervening on the side of the defense in a criminal prosecution brought under the Virginia *statute* prohibiting advertising by attorneys. The Attorney General argued that the indictment was for acts allowable under *Bates.* The indictment was dismissed.

Nor was Consumers Union prejudiced in any way by the post-*Bates* failure to amend the Rule. The Bar had stipulated the right of Consumers Union to publish its directory. But the Bar and the Court were left with the complex task of determining an entire regulatory program for lawyer advertising. Issues far broader than those of the instant case had yet to be resolved.

Furthermore, the District Court was unaware, because of its post-decision refusal to hear evidence on the issue, that the delay in adopting a new rule was the result of extensive activities by the Bar to recommend new advertising *and* solicitation rules which exceeded minimal constitutional requirements. The District Court failed to recognize that *Bates* left a number of serious questions unresolved. Indeed, if any point is clear at the present time it is that there is no concensus as to the extent to which lawyer advertising can be regulated. Eight states[12] have adopted the ABA Model Code in an essentially unaltered form. Eighteen states have adopted modified versions of the ABA Code.[13] Twelve states, including Virginia and the District of Columbia, have adopted permissive rules.[14] Six states retain restrictive policies.[15] And six have not changed their rule since Bates.[16]

[12] Arizona Supreme Court Rule 29(a) (Supp. 1979); Arkansas, 263 Ark. 948 (1978); Colorado, C.P.R., c. 2; Nebraska, C.P.R., c. 2 (amend. 1979); Nevada, Sup. Ct. R. 164 (1979); Gen. Stat. of North Carolina, App. VII, Canon 27; Washington, C.P.R., c. 2 (January 1979); West Virginia, C.P.R., c. 2.

[13] Alabama, C.P.R., c. 2; Alaska; Connecticut, C.P.R., c. 2; Delaware, C.P.R., c. 2; Florida Sup. Ct. Rules 54.925, 55.263; Georgia, Code Ann., Title 9 App. DR 2-101 (Supp. 1979); Indiana, C.P.R,, c. 2; Iowa, C.P.R., c. 2; Kansas, R. for Discipline of Attys., 225; Missouri, Sup. Ct. R. 4 (Supp. 1979); New Mexico, C.P.R., c. 2; New Jersey; Ohio, C.P.R., c. 2 (Page Supp. 1979); Oklahoma, Stat. Ann., Title 15, Ch. 1, App. 3; Oregon; Tennessee, Code Ann., R. of Sup. Ct, Appen. C.P.R.; Utah, R. Conduct, c. 2; Wyoming, 13 Land and Water Review 1978.

There was no legal or factual basis for criticizing the conduct of the Virginia Supreme Court, which had no knowledge that the District Court was awaiting amendment of the rule. Accordingly, to award fees for post-*Bates* lawful acts of a party is the most extreme abuse of discretion. Further, by denying the Virginia Court's petition for rehearing, the abuse of discretion was only compounded.

[14] California, Sup. Ct. Order in Bar Misc. 3922; District of Columbia, D.C. Ct. App. R. 10, App. A; Idaho, C.P.R, c. 2; Kentucky, Sup. Ct. R. 3-135 (July 1979); Maine, Bar R., 3.9 (May 1979); Maryland, Rules of Practice, App. F. (Supp. 1979); Massachusetts, 1979 Mass. Legis. Serv., S.J.C. R. 3:22; Michigan, Sup. Ct. Admin. Order, 1978-4 (November 13, 1979); Minnesota, C.P.R., c. 2 (West Supp. 1979); New York Jud. Law App. C.P.R., c. 2 (McKinney Supp. 1979-80); Pennsylvania, Ct. R., C.P.R., c. 2 (Purdon Supp. 1979); Virginia, Order of October 3, 1979; Wisconsin.

[15] Louisiana, Rev. Stat. Ann., Tit. 37, Ch. 4; Mississippi, Sup. Ct. Misc. Order No. 816 (September 19, 1979); New Hampshire, 4 N.H.L.W. 14A; Rhode Island, R. Ct. 47; Texas Stat. Ann. Tit. 14, App. Art. 12, § 8; Vermont, Stat. Ann. Tit. 12, App. IX, c. 2.

[16] Hawaii, Illinois, Montana, North Dakota, South Carolina, South Dakota.

CONCLUSION

The judgment of the District Court should be reversed insofar as it enjoins the Supreme Court of Virginia and the Chief Justice from enforcing the rule. The award of attorneys' fees against the Virginia Court should be reversed. The judgment of the District Court should be modified to enjoin the Virginia State Bar from enforcing the rule to the extent that it might be applied in a manner contrary to *Bates*. In the alternative, the case should at least be remanded with instructions to the District Court to take evidence on the question whether there were facts to justify an award of fees against the Virginia Court.

Respectfully submitted,

THE SUPREME COURT OF VIRGINIA
and
THE HONORABLE LAWRENCE W. I'ANSON
Appellants.

By:
s/ MARSHALL COLEMAN
Attorney General of Virginia

MARSHALL COLEMAN
Attorney General

WALTER H. RYLAND
Chief Deputy Attorney General

Supreme Court Building
1101 East Broad Street
Richmond, Virginia 23219
(804) 786-2071

CERTIFICATE

I, Marshall Coleman, Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States, and counsel for the Supreme Court of Virginia and the Chief Justice, hereby certify that three copies of this Jurisdictional Statement have been served upon each counsel of record for the parties herein by mailing same, first-class postage prepaid, this the 29th day of November, 1979, as follows:

Mark Silbergeld
Ellen Broadman
Consumers Union
1714 Massachusetts Avenue
Washington, D.C. 20036

Philip B. Kurland
Two First National Plaza
Chicago, Illinois 60603

James W. Benton, Jr.
Hill, Tucker & Marsh
214 East Clay Street
P. O. Box 27363
Richmond, Virginia 23261

The Honorable Daniel R. McLeod
Attorney General of South Carolina
Hampton Office Building
Columbia, South Carolina 29211

All parties required to be served have been served.

s/ MARSHALL COLEMAN
Attorney General of Virginia